IT'S TIME TO REVISIT AND REVISE THE COLLECTIVE ENTITY DOCTRINE

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I. INTRODUCTION

Most people are familiar with "pleading the Fifth." They understand it to mean they have "the right to remain silent"[1] and that the government cannot force them to disclose incriminating information that could lead to their own indictment or conviction.[2] What most people don't know, however, is that this right does not apply to most business-related activities. Under the little-known "collective entity doctrine," the Supreme Court has held that corporations,[3] partnerships,[4] labor unions,[5] and all "collective group[s]" with an "impersonal" character do not possess any privilege against self-incrimination.[6]

In its harshest opinion, the Court held in *Braswell v. United States*, by a vote of 5 to 4, that a corporation's sole shareholder could be forced to produce, compile, organize, and (by way of compelled testimony) authenticate his company's incriminating business records.[7] "[T]he custodian of . . . entity records holds those documents in a representative rather than a personal capacity," the Court reasoned.[8] Thus, "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," which has no Fifth Amendment privilege.[9] In other words, businesses have no privilege against self-incrimination, and records custodians are mere extensions of their

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[1] Miranda v. Arizona, 384 U.S. 436, 468 (1966).

[2] *See* Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring) (under the "plain and obvious meaning" of the Self-Incrimination Clause, "a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the State to aid it in convicting him of a crime").

[3] Wilson v. United States, 221 U.S. 361, 376, 385 (1911); Dreier v. United States, 221 U.S. 394, 400 (1911).

[4] Bellis v. United States, 417 U.S. 85, 101 (1974).

[5] United States v. White, 322 U.S. 694, 701 (1944).

[6] *See id.* at 699, 701.

[7] Braswell v. United States, 487 U.S. 99, 108–14 (1988).

[8] *Id.* at 109–10.

[9] *Id.* at 110.

businesses; therefore, they forfeit that privilege while acting on behalf of the business.

What the collective entity doctrine means in real-world terms is that businesses and their records custodians can *never* resist government-issued subpoenas on Fifth Amendment self-incrimination grounds, regardless of how small their business may be.[10] Assume, for example, that you and your spouse decide to start a small business. You go to your Secretary of State's website, fill out the necessary paperwork, and form "Mom and Pop, LLC." Congratulations, you have just forfeited a fundamental constitutional right. The moment you filed your articles of organization with the Secretary of State's Office, you and your spouse, as the business's records custodians, surrendered your right to withhold any business-related documents from the government.[11] The IRS—without even a reasonable suspicion of wrongdoing—can serve you with a subpoena duces tecum and require you to produce, compile, and authenticate all of your business's records. And if you refuse to comply, you will likely be held in contempt of court, meaning you could face serious fines and even jail time. In effect, the *Braswell* Court held that the government can force small-business owners to create the exhibits that will be used against them at trial.

This article argues that the Court should revisit the collective entity doctrine for two primary reasons: (1) the doctrine is inconsistent with dozens of related cases, especially in the area of corporate rights and the waiver of constitutional rights; and (2) the explosion of modern limited liability companies (LLCs) has caused millions of small-business owners to unwittingly forfeit a fundamental right, a result the *Braswell* Court could not have foreseen. This article proceeds in four parts. Part I provides a brief history of the collective entity doctrine, beginning with 1886's *Boyd v. United States* and ending with 2000's *United States v. Hubbell*. Part II shows how *Braswell* is inconsistent with the Court's self-incrimination jurisprudence and its evolving understanding and recognition of businesses' rights. Part III explains how the emergence of LLCs and other limited liability entities has caused millions of Americans to unwittingly forfeit their self-incrimination rights. And Part IV briefly addresses likely counterarguments to this article.

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[10] *Id.* at 108–10.

[11] *See id.*

II. A BRIEF HISTORY OF THE COLLECTIVE ENTITY DOCTRINE

As Yale law professor Akhil Amar has recognized: "The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights."[12] Sticking with this metaphor, the collective entity doctrine has proved to be a particularly difficult knot to untie. This section summarizes the Court's attempts—more accurately, failed attempts—to articulate a durable rationale for the doctrine.[13]

A. *The collective entity rule: state-sanctioned businesses and their agents have no Fifth Amendment self-incrimination rights.*

Individuals have a clearly established Fifth Amendment right to refuse to answer self-incriminating questions asked by state actors.[14] When a witness is subpoenaed to appear before a grand jury to give self-incriminating testimony, the usual practice is for the witness's counsel to advise the government, in writing, that the witness intends to assert her Fifth Amendment rights, at which point "the witness ordinarily should be excused from testifying."[15]

Similarly, the Fifth Amendment was originally interpreted to protect all private papers from government-compelled production. The Supreme Court first announced this original rule in 1886 in *Boyd v. United States*.[16] "[A]ny forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of a crime," the *Boyd* Court held, compels him to be a "witness" against himself in violation of the Fifth Amendment.[17] To the *Boyd* Court, using a person's property against him in a criminal case was

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[12] Akhil Amar & Renee L. Lerner, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995).

[13] Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 PITT. L. REV. 27, 65–66 (1986) (noting that the collective entity doctrine has proved to be a particularly convoluted due to the Court's "difficulty in articulating a durable rationale" for the doctrine).

[14] *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (recognizing that citizens have the right to refuse to answer "official questions . . . in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate [them] in future criminal proceedings"); Lisenba v. California, 314 U.S. 219, 240–41 (1941) (recognizing that suspects must be afforded the "free choice to admit, to deny, or to refuse to answer" the questions of state officials); *see also* Minnesota v. Murphy, 465 U.S. 420, 443–44 (1984) (Marshall, J., dissenting).

[15] UNITED STATES ATTORNEYS' MANUAL § 9-11.154 (1997).

[16] Boyd v. United States, 116 U.S. 616 (1886).

[17] *Id.* at 630.

tantamount to compelling him to utter an incriminating statement.[18] The *Boyd* Court did not distinguish between natural persons and corporations with respect to the application of the Fifth Amendment's self-incrimination privilege; its only concern was whether the suspect's privacy interests had been invaded in an intolerable manner.[19]

In the early 1900s, however, in *Hale v. Henkel*,[20] the Supreme Court abandoned *Boyd* and established two self-incrimination principles that have survived to this day. First, the *Hale* Court held that the privilege against self-incrimination is a *personal* privilege that cannot be invoked to protect a third party, including third-party corporations.[21] Second, and more importantly for this article, the Court held that corporations do not possess self-incrimination rights under the Fifth Amendment.[22]

In *Hale*, a corporate officer was served with a subpoena to produce corporate documents. The officer, on behalf of the corporation, resisted the subpoena on Fifth Amendment self-incrimination grounds. On appeal, the *Hale* Court rejected the officer's self-incrimination argument: "[W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State."[23] The Court held that corporate books should not be considered "private papers" worthy of Fifth Amendment protection.[24] The Court ended its opinion in *Hale* by holding:

> The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. ... He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to [in]criminate him.

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[18] *Id.* at 634–35.

[19] *See id.* at 630 ("It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offense." Rather, "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life" are unconstitutional.).

[20] *See generally* Hale v. Henkel, 201 U.S. 43 (1906).

[21] *Id.* at 69–70.

[22] *Id.*

[23] *Id.* at 74.

[24] *Id.* at 71–72 (rejecting *Boyd*'s premise that a corporation's "private papers" should presumptively receive constitutional protection).

> Upon the other hand, the corporation is a creature of the State. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . . . It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not . . . demand the production of the corporate books and papers for that purpose.
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> [W]e are of the opinion that an officer of a corporation . . . cannot refuse to produce the books and papers of such corporation . . . .[25]

These paragraphs have served as the basis for the collective entity doctrine for over a century.

Since *Hale*, the Court has further held that partnerships and labor unions are not entitled to a Fifth Amendment self-incrimination privilege,[26] but that sole proprietorships, however large, may still use the privilege to suppress business and personal documents.[27] In the 1944 decision *White v. United States*, the Court offered the following test to determine whether a group is a "collective entity" and thus entitled to no Fifth Amendment privilege:

> The test . . . is whether one can fairly say under all the circumstances that [the] particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common of group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[28]

Over thirty years later, however, in *Bellis v. United States*, the Court noted that the *White* test was "not particularly helpful in the broad range of cases,"[29] but did not offer any replacement test. Since *Bellis*, the Court had adopted a categorical approach to identifying collective entities: if the business is ratified by the State, it is a collective entity entitled to no self-incrimination rights; but if the

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[25] *Id.* at 74–76.
[26] Bellis v. United States, 417 U.S. 85, 93–97 (1974) (partnerships); White v. United States, 322 U.S. 694, 701 (1944) (labor unions).
[27] United States v. Doe, 465 U.S. 605, 617 (1984).
[28] *White*, 322 U.S. at 701.
[29] *Bellis*, 417 U.S. at 100.

business is not ratified by the State, it retains its Fifth Amendment right.[30]

B. *The act-of-production privilege: an exception to the rule.*

The collective entity doctrine is relatively well established: artificial legal entities and their agents have no privilege against self-incrimination under the Fifth Amendment.[31] In *Fisher v. United States*,[32] however, the Court announced an exception to this general rule. The *Fisher* Court held that the Fifth Amendment prevents the government from compelling a records custodian to produce, compile, and authenticate business records if the custodian's "act of production" would be personally self-incriminating.[33] As the Court later explained, by forcing a custodian to respond to a vague subpoena duces tecum, the government compels the custodian to admit the sought-after documents (i) exist, (ii) are in the custodian's possession or control, (iii) are authentic, and (iv) match the subpoena's description.[34] And the "existence, custody, and authenticity" of certain documents is often all a prosecutor needs to "furnish a link in the chain of evidence needed to prosecute."[35]

Accordingly, the Court now draws a sharp distinction between the *contents* of subpoenaed documents and the *actions* required to produce such documents: a suspect cannot resist a subpoena on the grounds that the contents of the sought-after documents are self-incriminatory; but she can resist an overly broad subpoena if her mere compliance with the subpoena would be self-incriminatory.[36]

The *Fisher* Court, however, left open the question of whether a suspect could assert the act-of-production privilege simply because she was the corporation's sole shareholder and records custodian. The Court addressed—but did not fully resolve—this issue in *Braswell v. United States*.[37] In *Braswell*, a federal grand jury issued a subpoena to Randy Braswell, ordering him to produce the books and records of his

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[30] *Compare Doe*, 465 U.S. at 617 (holding that sole proprietorships, no matter how large, are not collective entities), *with Bellis*, 417 at 100–01 (holding that corporations, no matter how small, are collective entities).
[31] *Bellis*, 417 U.S. at 88–89.
[32] Fisher v. United States, 425 U.S. 391 (1976).
[33] *Id.* at 4102–123.
[34] United States v. Hubbell, 530 U.S. 27, 36–37 (2000).
[35] *Id.* at 37–38 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).
[36] *Fisher*, 425 U.S. at 410–13.
[37] Braswell v. United States, 487 U.S. 99 (1988).

two single-shareholder corporations.[38] Braswell resisted this subpoena on Fifth Amendment grounds, arguing that, as the sole owner and operator of these companies, his mere act of production would amount to government-compelled self-incrimination, as a jury would inevitably conclude that he created and produced the sought-after documents.[39] The district court rejected Braswell's Fifth Amendment claim, holding that the collective entity doctrine "does not apply [even] when a corporation is so small that it constitutes nothing more that the individual's alter ego."[40] The Court of Appeals affirmed, holding that "Braswell, as [the] custodian of corporate documents, has no act of production privilege under the fifth amendment regarding corporate documents."[41]

The Supreme Court, in a 5-4 opinion by Chief Justice Rehnquist, affirmed the district court's ruling.[42] "[T]he custodian of . . . entity records holds those documents in a representative rather than personal capacity," the majority reasoned.[43] Thus, "the custodian's act of production is not deemed a personal act, but rather an act of the corporation."[44] And "[a]ny . . . Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course has no such privilege."[45] The Court's ruling was categorical: "[A] custodian's production of corporate records is deemed not to constitute testimonial self-incrimination," and

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[38] *Id.* at 101.
[39] *See id.*
[40] *Id.* at 102 (quoting the District Court's opinion).
[41] *Id.* (quoting the Fifth Circuit's opinion).
[42] *Id.*
[43] *Id.* at 109–10.
[44] *Id.* at 110. The *Braswell* decision, however, contains a puzzling footnote. Near the end of the opinion, the *Braswell* majority noted:

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

Id. at 118 n. 11. It appears that the *Braswell* majority was leaving open the possibility of act-of-production-like exception to its unconditional holding. Lower courts, however, have completely ignored this footnote and have not entertained any exceptions to the collective entity rule as announced in *Braswell*. *See, e.g.*, *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529–30 (9th Cir. 2018) (collecting cases).
[45] *Id.*

"[a] custodian may not resist a subpoena for corporate records on Fifth Amendment grounds," regardless of how small or personal the entity may be.[46]

In an unusual alliance, Justice Kennedy was joined by Justices Brennan, Marshall, and Scalia in dissent in *Braswell*. Justice Kennedy's sharp dissent argued that the majority's decision was inconsistent with the "spirit and letter" of the Fifth Amendment.[47] "By issuing a subpoena...direct[ly] to [the business owner] personally," Justice Kennedy argued, "[the government] has forfeited any claim that it is simply making a demand on [the] corporation."[48] What the government really seeks when it issues blanket subpoenas, the dissent continued, is "the right to choose any corporate agent as the target of its subpoena" and compel that individual to "disclose the contents of his own mind."[49]

The act-of-production privilege was again addressed in *United States v. Hubbell*.[50] In *Hubbell*, the government issued a vague, broadly worded subpoena duces tecum to Webster Hubbell, seeking eleven categories of documents related to an Arkansas corporation.[51] Hubbell resisted this subpoena on Fifth Amendment grounds.[52] The prosecution obtained an order to compel production of the sought-after documents, and Hubbell was forced to produce 13,120 pages of documents that eventually were used to secure his indictment.[53]

On appeal, the Supreme Court held that the Self-Incrimination Clause protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with "reasonable particularity."[54] It was "apparent" that the prosecution could not identify, procure, or authenticate the sought-after documents without Hubbell's cooperation, the Court noted.[55] Thus, it used a vague and overly broad subpoena to compel his cooperation, which essentially amounted to "a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions."[56] "[I]t [was]

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[46] *Id.* at 113.
[47] *Braswell*, 487 U.S. at 126 (Kennedy, J., dissenting).
[48] *Id.* at 127–28 (Kennedy, J., dissenting).
[49] *Id.* at 126, 128 (Kennedy, J., dissenting).
[50] United States v. Hubbell, 530 U.S. 27 (2000).
[51] *Id.* at 31.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 33–34.
[55] *Id.* at 41.
[56] *Id.*

undeniable," the Court continued, "that providing a catalog of existing documents fitting within any of the...broadly worded subpoena categories could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"[57] The Court concluded that this sort of "fishing expedition" is barred by the Fifth Amendment when complying with the subpoena would lead to testimonial self-incrimination.[58]

At the end of the day, once these cases are synthesized, you're left with the following rule: state-sanctioned entities (such as corporations, labor unions, and partnerships) and their records custodians have no privilege against self-incrimination when responding to the government's requests for business-related documents, *unless* the records custodian's mere act of producing the requested records would personally incriminate her.

III. *BRASWELL* IS INCONSISTENT WITH THE COURT'S SELF-INCRIMINATION JURISPRUDENCE AND ITS EVOLVING UNDERSTANDING AND RECOGNITION OF BUSINESSES' RIGHTS

Braswell stands in stark contrast with the Court's self-incrimination jurisprudence and its decisions recognizing the fundamental rights of business entities. This section illustrates how the collective entity doctrine is inconsistent with the values underlying the Self-Incrimination Clause and the Court's approach to other constitutional rights.

A. *Braswell is inconsistent with the values underlying the Self-Incrimination Clause.*

The authors of the Fifth Amendment "were not naive or disregardful of the interests of justice."[59] Rather, they enshrined in our Bill of Rights the principle that it is better for an accused to go free than for the prosecution to build its criminal case "with the assistance of enforced disclosures by the accused."[60] As the Court has instructed, the Self-Incrimination Clause should be given a "liberal

[57] *Id.* at 41–42.
[58] *Id.* at 42–43.
[59] Ullmann v. United States, 350 U.S. 422, 427 (1956).
[60] *Id.* at 426–27.

construction"[61] to ensure the government does not compel an accused to use "the contents of his own mind" to secure his own conviction.[62]

The purposes underlying the Self-Incrimination Clause were laid out in *Murphy v. Waterfront Commission of N.Y. Harbor*.[63] As the Court explained, the Clause "reflects many of our fundamental values and most noble aspirations," namely (1) to avoid the "cruel trilemma" of perjury, contempt, or self-accusation that existed before the Self-Incrimination Clause; (2) to ensure the prosecution "shoulders its entire burden" during its criminal case, rather than forcing the accused to work toward his own indictment or conviction; (3) to respect each person's inner-sanctum of privacy and autonomy; (4) to require the government to "leave the individual alone until good cause is shown for disturbing him"; and (5) to protect the innocent, who often become ensnared in overzealous or unfounded prosecutions.[64]

All of these values are undercut in every case in which the collective entity doctrine is applied to small, family-owned businesses. Business owners, not their businesses, are routinely placed in the "cruel trilemma" the Fifth Amendment was designed to avoid—owners who do not comply with the government's subpoenas are typically held in contempt and compelled to self-accuse.[65]

The collective entity doctrine, moreover, allows the government to intrude into small-business owners' private lives without good cause. The Constitution provides a finely wrought procedure the state must follow if it wishes to inspect an accused's private papers. The Fourth Amendment dictates that the government may search or seize an accused's "papers" or "effects" only if it has probable cause and the intrusion is approved by a "neutral and detached magistrate."[66] Under *Braswell*, however, the government has free license to force nearly all business owners to compile, organize, and authenticate thousands of pages of potentially incriminating documents without cause and without judicial oversight. Rather than "shoulder the entire load of its prosecution,"[67] *Braswell* allows the state to force the accused to do most of the heavy lifting.

Moreover, allowing small-business owners to assert a Fifth Amendment privilege would not hamstring white-collar law

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[61] *Id.* at 427.
[62] Curcio v. United States, 354 U.S. 118, 128 (1957).
[63] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).
[64] *See id.* at 55.
[65] *See generally* In re Twelve Grand Jury Subpoenas, 908 F.3d 525 (9th Cir. 2018).
[66] Johnson v. United States, 333 U.S. 10, 13–14 (1948).
[67] *Murphy*, 378 U.S. at 52, 54–55.

enforcement.[68] Even if the government's subpoena powers were curtailed, the government would still be able to access its sought-after documents by obtaining a search warrant through the normal and minimally burdensome procedures already in place. Requiring the government to go through these Fourth Amendment-required procedures is a small price to pay when weighed against the Fifth Amendment rights of millions of small-business owners.[69]

B. *The Braswell majority's reasoning does not conform with the Supreme Court's approach to other constitutional rights.*

Under current Supreme Court precedent, collective entities have the right to engage in free speech,[70] the right to freely exercise their religion,[71] the right to freely associate with whom they choose,[72] the right to be free from unreasonable government searches and seizures,[73] the right not to be tried for the same crime more than once,[74] the right to a jury trial,[75] the right to equal protection under the law,[76] and the right to due process of law.[77] The *Braswell* Court, however, held that collective entities can *never* enjoy self-incrimination protections under the Fifth Amendment.[78] As Duke law professor Brandon Garrett has explained: "This reasoning simply does not fit the Supreme Court's approach to other constitutional rights, particularly in the way that [collective entities'] lack of constitutional protection . . . has the potential to deprive *individuals* of constitutional protection."[79]

The *Braswell* majority's categorical refusal to extend Fifth Amendment rights to collective entities "directly impact[s] the rights

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[68] *See* Braswell v. United States, 487 U.S. 99, 129 (1988) (Kennedy, J., dissenting).
[69] Additionally, many business owners would be unable to assert a Fifth Amendment privilege under the Court's "foregone conclusion" analysis described in Fisher v. United States, 425 U.S. 391, 411–12 (1976), and United States v. Hubbell, 530 U.S. 27, 43–44 (2000) (holding that a suspect cannot assert the act-of-production privilege if the subpoena is so specific that the existence of the sought-after documents is a "foregone conclusion").
[70] Citizens United v. FEC, 558 U.S. 310, 364–65 (2010).
[71] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708 (2014).
[72] Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[73] G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).
[74] United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977).
[75] S. Union Co. v. United States, 567 U.S. 343, 350–52 (2012).
[76] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933).
[77] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287, 297 (1980).
[78] Braswell v. United States, 487 U.S. 99, 108–10 (1988).
[79] Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 133 (2014).

of individual employees [and officers]," depriving them of a fundamental right simply because of their choice to compete in the marketplace.[80] As the *Hobby Lobby* Court explained, a collective entity's rights are often inseparable from the rights of those who "own, run, and are employed by [that entity]," and "[w]hen rights . . . are extended to [business entities], the purpose is to protect . . . these *people*."[81]

"The law is not captive to its own fictions."[82] When a prior decision's doctrinal "underpinnings have been eroded by subsequent developments [in] constitutional law," the principles of *stare decisis* no longer apply.[83] By revisiting and revising the collective entity doctrine, the Court can restore its self-incrimination jurisprudence to its rightful place and ensure that small-business owners are not deprived of their fundamental constitutional rights simply because they chose to compete in the marketplace.

IV. WITH THE EMERGENCE OF LLCS AND OTHER LIMITED LIABILITY ENTITIES, *BRASWELL* IS CAUSING MILLIONS OF AMERICANS TO UNKNOWINGLY WAIVE A FUNDAMENTAL RIGHT

One of the main problems with the collective entity doctrine is that nobody knows about it. When a soon-to-be small-business owner begins filling out his LLC's articles of organization, there is no warning that says, "by creating a state-recognized business entity, you are hereby waiving your Fifth Amendment privilege against self-incrimination in certain situations." Instead, business owners are left in the dark until the IRS comes knocking with a subpoena duces tecum, only then to find out they have no privilege to withhold self-incriminating business documents. Even more troubling, the government can require their target to produce, compile, and organize these sought-after documents, effectively requiring the business owner to create the exhibits that will be used against her at trial. Due to the explosion of modern limited liability entities (namely LLCs), the Court should revisit the collective entity doctrine to ensure that current and

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[80] *See id.* at 157; *see also* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) (arguing that the Court's categorical approach to the rights of collective entities is misguided).

[81] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014) (emphasis added).

[82] *Braswell*, 487 U.S. at 130 (Kennedy, J., dissenting).

[83] Alleyne v. United States, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring) (citing United States v. Gaudin, 515 U.S. 506, 521 (1995) (internal quotation marks omitted)).

would-be business owners are not presented with an unconstitutional Hobson's choice when they create a business.

A. *Braswell presents would-be business owners with a surreptitious and unconstitutional Hobson's choice.*

"The emergence of the LLC is astounding."[84] In 1988, when *Braswell* was decided, only two states had laws recognizing LLCs.[85] By 1997, however, every state had a statute allowing for the formation of LLCs,[86] and today there are over 1.2 million LLCs in the United States—over 300,000 of which are single-member entities operated as sole proprietorships.[87]

Under *Braswell*'s reasoning, none of these businesses or their custodians have Fifth Amendment self-incrimination rights, and their owners forfeited those same rights when they filed their articles of organization with the state. Business owners do not forfeit their free speech rights when they form a legal entity.[88] Nor do they forfeit their associational rights.[89] They retain protections from unreasonable searches and seizures.[90] And they may continue to freely exercise their religion without undue state interference.[91] But, under *Braswell*, business owners automatically forfeit their privilege against self-incrimination when they form a state-recognized business entity.

Accordingly, *Braswell* presents would-be business owners with a choice: they can create a state-recognized business entity *or* they can retain their privilege against self-incrimination, but they cannot do both. This Hobson's choice is particularly troublesome because business owners are often completely unaware they are forfeiting a fundamental right when the form a business entity. And, outside of *Braswell*, there is nothing in the Court's Fifth Amendment jurisprudence to suggest that forming a business should lead to the

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[84] Sandra K. Miller, *The Duty of Care in the LLC: Maintaining Accountability While Minimizing Judicial Interference*, 87 NEB. L. REV. 125, 132 (2008).
[85] Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 79 (2005).
[86] Lila L. Inman, *Personal Enough for Protection: The Fifth Amendment and Single-Member LLCs*, 58 WM. & MARY L. REV. 1067, 1085, 1086 (2017).
[87] *See* Brent M. Johnston, *The Federal Tax Personality of Disregarded LLCs*, 47 WASHBURN L.J. 203, 203 n. 2 (2007).
[88] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364–65 (2010).
[89] Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[90] G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977).
[91] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014).

forfeiture of constitutional rights, making the forfeiture all the more surprising and troublesome.[92]

In this regard, *Braswell* is incompatible with the Court's jurisprudence requiring knowing, intentional waivers of constitutional rights. Implied waivers of constitutional rights are strongly disfavored, and the Court has developed a strong presumption against implied waivers of fundamental constitutional rights.[93] The Court, for example, will not recognize a waiver of Fifth Amendment self-incrimination rights unless the waiver was (1) "the product of a free and deliberate choice," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[94] Contrary to this well-established law, *Braswell* inserted a tacit, automatic waiver of self-incrimination rights into every business's articles of organization. The moment a business-owner files her charter with the state, she has unwittingly relinquished one of her fundamental constitutional rights.

In a recent collective entity doctrine case, for example, the Ninth Circuit held that because a small-business owner "cho[se] to operate his businesses as a corporation or LLC and *not* as a sole proprietorship," he "knowingly sought out the benefits of these forms" and thus could not be "shielded from its costs."[95] In other words, under the current iteration of the collective entity doctrine, one of the "costs" of being a small-business owner is a forfeiture of fundamental rights. This sort of Hobson's choice is inconsistent with the Court's modern understanding of constitutional rights.[96] Withholding Fifth Amendment rights from members of collective entities is inconsistent with precedent and out-of-tune with our modern understanding of business personhood.[97]

Braswell is also inconsistent with the act-of-production privilege announced in *Fisher* and *Hubbell*. When a suspect is forced to comply with a broadly worded subpoena, the government compels the custodian to admit the sought-after documents (i) exist, (ii) are in the suspect's custody or control, (iii) are authentic, and (iv) match the

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[92] *See* Braswell v. United States, 487 U.S. 99, 130 (1988) (Kennedy, J., dissenting).
[93] *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
[94] Moran v. Burbine, 475 U.S. 412, 421 (1986).
[95] In re Twelve Grand Jury Subpoenas, 908 F.3d 525, 530 (9th Cir. 2018).
[96] *Cf.* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1156 (10th Cir. 2013) (Gorsuch, J., concurring).
[97] *See* Allen J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 285–89 (2014).

subpoena's description.[98] And the "existence, custody, and authenticity" of certain documents is often all a prosecutor needs to "furnish a link in the chain of evidence needed to prosecute."[99] As it is currently applied, the collective entity doctrine allows the government to compel owners of small, family-owned businesses to involuntarily further their own prosecutions. Accordingly, because of *Braswell* and the courts' exception-free application of the collective entity doctrine, small-business owners can be forced to create the exhibits that will be used against them at trial. The Fifth Amendment demands more.

B. *The Court should, at a minimum, revisit this area of the law to hold that single-member LLCs are not "collective entities" for the purposes of the Self-Incrimination Clause.*

LLCs have "blur[red] the traditional distinctions between individual and group business activities."[100] And closely-held LLCs—unlike the large-scale corporations that dominated the business landscape when *Braswell* was decided—do not possess independent institutional identities; they are merely extensions of their owner(s).[101]

In the much-discussed *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[102] for example, no court at any level of the case even entertained the idea that the acts of Jack Phillips might be distinct from the acts of his company. It was a basic assumption that, as the company's sole owner and operator, Phillips's rights were inseparable from his company's rights. The reason for this assumption is clear: closely-held businesses are often mere extensions of their owners; and withholding constitutional rights from a closely-held business is no different than withholding constitutional rights from the people who own and operate them.

As the *Braswell* Court itself recognized, its seemingly exception-free collective entity rule is problematic when applied to single-member businesses. In what has been termed "the *Braswell* footnote," the Court noted:

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[98] United States v. Hubbell, 530 U.S. 27, 36–37 (2000).
[99] *Id.* at 37–38 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).
[100] Cole, *supra* note 85, at 77.
[101] *See* Inman, *supra* note 86, at 1095, 1097.
[102] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.[103]

It appears the *Braswell* majority was leaving open the possibility of an act-of-production-like exception to its unconditional holding. The lower courts, however, have completely ignored this footnote and have not entertained any exceptions to the collective entity rule announced in the body of the *Braswell* opinion.[104] For this reason, *Braswell* remains unwavering, and with the rise of modern limited liability entities, millions of Americans have unknowingly waived a fundamental constitutional right. This explosion of limited liability entities—which the *Braswell* Court could not have foreseen—warrants a reevaluation of the collective entity doctrine.

Moreover, closely-held LLCs, unlike large corporations, are not meaningfully distinguishable from sole proprietorships, which *are* entitled to self-incrimination protections.[105] The Court in *Bellis v. United States*, for example, explicitly noted that the collective entity doctrine should often not apply to "small family partnership[s]."[106] The Court cited with approval *United States v. Slutsky*,[107] which held that a small, two-man partnership could rely on the Fifth Amendment as a safe haven because the partners were intimately involved in the partnership's day-to-day operations.[108] As a lower court later put it: "the *Bellis* Court contemplated that individual owners of the proverbial 'Mom and Pop' stores would continue to enjoy the protection[s] of the Fifth Amendment . . . ."[109]

The rationale behind the *Bellis* "small family partnership" exception applies with equal—if not greater—force to small, family-owned LLCs, as they are often extremely personal businesses that are mere extensions of their owners. *Braswell*, however, in effect overruled this portion of *Bellis* and categorically withheld Fifth

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[103] Braswell v. United States, 487 U.S. 99, 118 n. 11 (1988).
[104] *See, e.g.*, *In re* Twelve Grand Jury Subpoenas, 908 F.3d 525, 529–30 (9th Cir. 2018) (collecting cases).
[105] *See* United States v. Doe, 465 U.S. 605, 617 (1984).
[106] Bellis v. United States, 417 U.S. 85, 101 (1974).
[107] United States v. Slutsky, 352 F. Supp. 1105 (S.D. N.Y. 1972).
[108] *Id.* at 1107.
[109] *In re* Grand Jury Subpoena Duces Tecum, 605 F. Supp. 174, 178 (E.D. N.Y. 1985).

Amendment protections from these "Mom and Pop" businesses.[110] *Braswell*, thus, is inconsistent with the case law that preceded it,[111] and the case law that has followed it.[112] This constitutional "anomaly" is in need of reevaluation.[113] As Penn State law professor Lance Cole put it: "The exploding use of new forms of limited liability business entities, and the application of the collective entity doctrine to those new entities, necessitates a re-examination of the collective entity doctrine."[114]

V. COUNTERARGUMENTS CONSIDERED

Throughout the last half-century or so, only two arguments in favor of the collective entity doctrine have emerged: (1) it has "a lengthy and distinguished pedigree," and (2) abolishing the doctrine would hamstring white-collar law enforcement officials. This section rebuts these arguments.

A. *The collective entity doctrine may have a "lengthy" history, but it is anything but "distinguished."*

Supporters of the collective entity doctrine often quote Chief Justice Rehnquist's language in *Braswell*, where he baldly asserts that "collective entity rule has a lengthy and distinguished pedigree."[115] This claim is half right: the collective entity doctrine has an extensive history, but it is anything but "distinguished."

The collective entity doctrine has been roundly criticized by judges, lawyers, and scholars since its inception. As professor William Stuntz has noted, the collective entity doctrine originated from a "single result-oriented paragraph" in *Hale v. Henkel*.[116] The *Hale* Court, moreover, cited no authority in support of its reasoning and showed a "remarkable" lack of analysis in issuing such a broad pronouncement.[117] In expanding upon *Hale*, the Supreme Court has not been a model of consistency. The Court has often given "wavering" and "varying" explanations for why an individual forfeits

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[110] *See* Braswell v. United States, 487 U.S. 99, 108-10 (1988).
[111] *See Bellis*, 417 U.S. at 101.
[112] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707-08 (2014).
[113] Cole, *supra* note 85, at 12.
[114] *Id.*
[115] *Braswell*, 487 U.S. at 104 (punctuation altered).
[116] William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 429 (1995) (citing *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906)).
[117] Cole, *supra* note 85, at 17–18.

her Fifth Amendment rights merely because she works for a business organization.[118] And the doctrine is currently out-of-line with the Court's current understanding of corporate personhood.[119] Labeling the collective entity's pedigree as "distinguished" belies reality.

B. *Discarding the collective entity doctrine would not hamstring white-collar law enforcement.*

As Justice Kennedy observed in his *Braswell* dissent, the purported damage from limiting the collective entity doctrine is unlikely to materialize for a number of reasons.[120] First, many business owners would not be able to assert a Fifth Amendment privilege under the forgone conclusion analysis described in *Fischer* and *Hubbell*.[121] Second, the businesses the government has a strong interest in regulating would not fall into the single-owner exception contemplated by the *Braswell* Court.[122] Finally, and most importantly, even if the government's subpoena powers were curtailed, it would still be able to access its sought-after documents by obtaining a search warrant through the normal, and minimally burdensome, procedures already available.

Accordingly, the minimal and occasional frustration of the government's subpoena power is a small price to pay for recognizing and protecting business owners' constitutional rights—especially in the case of small businesses, where the "testimonial consequences" of complying with a subpoena are amplified.[123] Requiring the government to go through these Fourth Amendment-required

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[118] Alito, *supra* note 13, at 65–68.

[119] *See* Inman, *supra* note 86, at 1067, 1071–72, 1097.

[120] *See* Braswell v. United States, 487 U.S. 99, 129 (1988) (Kennedy, J., dissenting) (noting that "the dangers prophesied by the majority," and the government, were "overstated").

[121] *See id.* at 120. Under the "foregone conclusion" doctrine, the recipient of a subpoena cannot object to that subpoena if the government already has substantial proof that the documents targeted by the subpoena exist. *See generally* Richard P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 29–40 (1987). More specifically, to overcome a suspect's Fifth Amendment claim, the government must show (1) it is "in no way relying on the 'truthtelling' of the [suspect]," (2) the "existence and location of the [sought-after documents] are a foregone conclusion and the [suspect] adds little or nothing to the sum total of the [g]overnment's information" by producing the documents, and (3) the document's "existence" or "possession" are not substantially at issue in the case. *See Fisher v. United States*, 425 U.S. 391, 411–12 (1976).

[122] *See Braswell*, 487 U.S. at 118 n. 11.

[123] *See* United States v. Doe, 465 U.S. 605, 613 (1984); *Braswell*, 487 U.S. at 118 n. 11.

procedures is a small price to pay when weighed against the Fifth Amendment rights of millions of small-business owners.

Moreover, the quantum leaps in technology since *Braswell* was decided mean there is now an enormous difference in the ability of prosecuting agencies to investigate cases. All prosecutors now have easy online access to information from third-party sources (such as Corporation Commissions, Secretary of States' Offices, and County Recorders' Offices) and can easily access bank records and tax returns for free. Investigative reports from companies such as Transunion are also available to prosecuting agencies at minimal cost. Thus, the "prosecutorial convenience" rationale underlying the Court's collective entity cases no longer serves as a legitimate justification for the wholesale forfeiture of business owners' Fifth Amendment rights.

VI. CONCLUSION

In 1988, in *Braswell v. United States*, the Court held that small-business owners have no right to resist government-issued subpoenas on Fifth Amendment self-incrimination grounds. In the 30-plus years since *Braswell* was decided, a lot has changed. Small, family-owned LLCs have exploded in popularity, and the Supreme Court has greatly expanded business entities' legal rights, recognizing that the distinction between "business" and "owner" is often illusory. These changes warrant at least a revisiting of—and likely revisions to—the collective entity doctrine. The Court should revisit the collective entity doctrine to ensure that these small-business owners are not needlessly and unwittingly forfeiting their fundamental self-incrimination rights.